

G-Regs™

Cosmetics: WBZ Annual Report 2014



Full title: Wettbewerbszentrale (Centre for Protection against Unfair Competition) Annual Report 2014

Chapter 8: Cosmetics: In July 2013, the Regulation (EC) No. 1223/2009 (EU Cosmetics Regulation) entered into force. It is flanked by Commission Regulation (EU) No. 655/2013 laying down common criteria for the justification of claims used in relation to cosmetic products (for details, see the Annual Report 2013, p. 54). The new "cosmetic claims regulation" (*Claims-Verordnung*) codifies general principles of competition. For example, it states under the key word "demonstrability" (*Belegbarkeit*) that advertising claims with respect to cosmetic products must be demonstrated by sufficient and verifiable evidence. The conclusiveness of the evidence and/ or proof must be consistent with the type of the advertising claim being made.

And exactly that is the main topic in the area of cosmetics: opinion polls are used as evidence for the effectiveness of products, results of opinion polls are represented inaccurately or the citation required pursuant to Section 5a Subsection 2 UWG is lacking. In the last annual report, the Wettbewerbszentrale reported on a company that advertised in a magazine with the statement that "95% of testers would recommend the perfume E. to their girlfriends" (*95% der Testerinnen würden den Duft E. ihrer Freundin empfehlen*). The case concerned volume 07/13 of the magazine Glamour. Apart from the fact that the test results were not shared, it turned out in the course of proceedings that the content of the statement was inaccurate. This is because the question "Would you recommend E. to a girlfriend?" (*Würden Sie E. einer Freundin weiterempfehlen?*) was answered by 66% with "Yes, definitely" (*Ja, ganz bestimmt*), whereas 29% answered with "Yes, probably" (*Ja, wahrscheinlich*). The advertising claim did not reflect this result. Even before a hearing, the other party acknowledged the claim of the Wettbewerbszentrale, so that it ended with a judgment based on acknowledgement (LG Mainz, judgment of 25 April 2014, 10 HK O 1/14; F 4 0847/13).

However, most cases were ended with declaration of discontinuance. For example, a company agreed to no longer advertise with the statement that after just four weeks the skin of 92% of women looked visibly firmer and appeared to have been lifted. Except for the reference to a "clinical trial" (*klinischen Test*), it lacked any further information (F 4 0066/14). Another company agreed to no longer advertise an anti-aging cream with the statement "The effect is scientifically proven" (*Die Wirkung ist wissenschaftlich bestätigt*), if a citation for the study is not provided at the same time (F 4 0531/14). The simple statement "95% of testers would recommend the new Lash Princess volume mascara to their girlfriends" (*95% der Testerinnen würden die neue Lash Princess volume mascara ihren Freundinnen empfehlen*) is also impermissible without the reference to a citation with which those interested can look up the questions, criteria, weighting, etc. (F 4 0530/14). And a cream advertised in newspapers as "Red Wonder" (*Rotes Wunder*) will no longer be able to be advertised without specifying a corresponding reference/ citation (F 4 0585/14). Except in the cases of the test or survey advertising, the main focus of the complaints were in the area of misleading statements.

URL of source: <https://www.wettbewerbszentrale.de/media/getlivedoc.aspx?id=34405> (English version)

<https://www.wettbewerbszentrale.de/media/getlivedoc.aspx?id=34292> (German version)

A typical example is the advertising of a company that promoted its shampoo in a two-page advertisement with the statement "Moisture & up to 95% more volume" (*Feuchtigkeit & bis zu 95% mehr Volumen*). The "asterisk" (*Sternchen*) after the word "volume" (*volumen*) was explained on the second page, opposite to the reading direction and barely perceptible, as „vs. unwashed hair“ (*vs. ungewaschenes Haar*). It is clear that such a comparison is "misleading" (*hinkt*) because the consumer does not expect a comparison between washed and unwashed hair (F 4 0490/14). So-called "green washing" (*Green washing*) is also the subject of complaints. A line of cosmetics, which also contains chemical ingredients, cannot be advertised with statements like "Pure from the beginning, purer than ever" (*Pur von Anfang an, reiner denn je*) or "Skin care in harmony with nature" (*Hautpflege im Einklang mit der Natur*) because the consumer is given the wrong impression of natural cosmetics (F 4 0004/14).

It is striking that most cases did not concern promotional activities of small or medium-sized enterprises, but rather large companies that predominately issue declarations of discontinuance upon the warning of the Wettbewerbszentrale. As a result, towards the end of 2014, there only two court cases still pending. The "threat" (*Drohung*) contained in Article 20 Subsection 2 Paragraph 3 of the Cosmetics Regulation should be reason enough for the cosmetics industry to adjust their advertising to the common criteria. This is because if a report to be submitted to the Commission by July 2016 concludes that the promotional statements contradict the common criteria, the Commission will take "appropriate measures to ensure that these criteria are fulfilled" (*angemessene Maßnahmen, um die Erfüllung dieser Kriterien sicherzustellen*) in cooperation with the Member States. This could lead to a type of "Health Claims Regulation" (*Health Claims Verordnung*) in the cosmetics industry as well. Incidentally, this was also the purport of a presentation on this topic held at the 5th Health Convention of the Wettbewerbszentrale.
